IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 260 OF 2006

M/s. Tarcar Real Estate Pvt. Ltd.,
A Company registered under the
Indian Companies Act 1956,
with its registered Office at
Tarcar Mansion, Near L.I.C.
Building, Cortin, Panaji, Goa
represented by its Director Mr.
Sanjeev P.K. Tarkar, major,
resident of Altinho, Panaji, Goa. ..... Petitioner.

V/s.

1) Recovery/Sale Officer,
Central Registrar of Co-operative Societies,
Court No.1, C/o. The Mapusa
Urban Co-op. Bank of Goa Ltd.,
"Nandadeep", Mapusa, Goa.

2) Registrar of Co-operative
Societies, Government of Goa,
Panaji, Goa.

3) The Mapusa Urban Co-op.
Bank of Goa Ltd.,
a Multi State Co-operative
Bank with its registered office at
"Nandadeep" Mapusa, Goa.

4) Ms. Chatura S. K. Tarcar,
Pinto Building, near T.V. Tower,
Altinho, Panaji, Goa.

5) Mr. Salaudin Khan,
1-155, S.V. Road, Panaji, Goa.

6) Mrs. Nilima Satoskar,
Landscape Mendes,
Caranzalem, Goa. ..... Respondents.

Mr. S.D. Lotlikar, Senior Advocate with Ms. Shambhavi Rao, Advocate for the petitioner.

Mr. J. P. Mulgaonkar, Advocate for respondent 1.

Mr. M. S. Sonak, Advocate for respondent No.3.

Mr. A.N.S. Nadkarni, Advocate for respondent .6.

CORAM : SMT. RANJANA P. DESAI &
N.A. BRITTO, JJ.

Date of reserving the Order :
4th July, 2006.

Date of pronouncing the Order :
18th July, 2006.

O R D E R : (PER Smt. RANJANA P. DESAI)

The petitioner is a company, registered under the Indian Companies Act, 1956. In this petition, the petitioner has, inter alia, challenged the sale dated 14.3.03 of the property known as "Quennem" admeasuring 37,895 sq. metres and situated at Taleigao, Tiswadi Taluka ("the said property" for short) mortgaged by the petitioner to respondent 3 Bank while obtaining loan from respondent 3 and certificate of sale dated 19.4.03 issued by the first respondent who is the Recovery/Sale Officer, Central Registrar of Co-operative Societies in favour of the third respondent. The third respondent is a Multi-State Co-operative bank, registered under the Multi-State Co-operative Societies Act, 2002 ("the said Act" for short).

2. The facts giving rise to this petition, as stated in the petition, may be shortly stated.

The petitioner had availed a loan of Rs.42,50,000/- from respondent 3 and as security for repayment of the said loan the petitioner had mortgaged the said property to respondent 3. According to the petitioner, on account of unprecedented slump in the real estate business, the petitioner received a set back. The petitioner could not effect the repayment of the said loan as agreed, in consequence of which, the third respondent which is a multi-state co-operative bank, initiated recovery proceedings before the Asst. Registrar of Co-operative Societies against the petitioner and respondents 4 and 5.

3. By award dated 11.7.2000, the claim of respondent 3 as against the petitioner and respondents 4 and 5 was allowed and the petitioner and respondents 4 and 5 were directed to pay to the third respondent-bank jointly and severally a sum of Rs.68,56,752/- as on 31.3.2000 with further interest at the rate of 20 % per annum from 1.4.2000 till full and final payment along with costs of the proceedings.

4. According to the petitioner, the decretal amount having remained unpaid, on 22.1.2001, the Recovery/Sale Officer i.e. the first respondent served a demand notice on the petitioner and

respondents 4 and 5 demanding payment of an amount far in excess of the decretal amount with exorbitant interest, and informed the petitioner that in the event the petitioner and said respondents 4 and 5 failed to effect the payment, action under Rule 22 of the Multi-State Co-operative Societies Rules 1985 ("the said Rules" for short) for recovery of the amount demanded would be taken against them. Respondent 3 made application dated 15/12/2000 to respondent 1 for execution of the award in favour of respondent 3. Similar application was made by respondent 3 on 13.12.2000 before respondent 1 seeking execution of the award in its favour against M/s. S.V. Real Estate. In neither of the said applications respondent 3 sought enforcement of the mortgage of the said property for recovery of its dues. It is the case of the petitioner that so far as the application for execution against M/s. S.V. Real Estate is concerned, the petitioner was not joined as a party.

5. On 24.8.02, the first respondent issued a proclamation and written notice of sale of the said property, fixing sale by public auction on 5.10.02 at 11.30 a.m. The total amount due from the judgment-debtors was stated to be Rs.1,78,81,224/- as on 22.8.02 and further interest at the rate of 20 % per annum from 23.8.02.

6. It appears that M/s. S.V. Real Estate, a sole proprietorship firm of Mr. Sandeep S. Verlekar, had obtained a loan

of Rs.75,00,000/- from the third respondent-bank for the purpose of its business of real estate for which the petitioner had stood as guarantor and the petitioner had mortgaged the said property in its capacity as a guarantor as security for the said loan in favour of respondent 3 vide Deed of Mortgage dated 17.11.94. The loan having remained unpaid, respondent 3 initiated proceedings under the said Act before the first respondent for recovery of the said loan amount from the said M/s. S.V. Real Estate, Ms Chatura S.K. Tarcar and Mr. Sanjeev P.K. Tarkar. Vide award dated 11.7.2000, the first respondent allowed the claim of the third respondent against M/s. S.V. Real Estate, Ms. Chatura S.K. Tarcar and Mr. Sanjeev P.K. Tarkar and directed them to pay jointly and severally a sum of Rs.1,81,86,950/- to respondent 3 as on 30.5.2000 with further interest at the rate of 20 % per annum from 31.5.2000 till full and final payment. It is the case of the petitioner that the petitioner who was a guarantor for the said loan was not made a party to the said proceedings and there was no award against the petitioner directing it to pay the said amount, nor was there any order directing enforcement of the mortgage of the said property. The first respondent issued a proclamation and written notice of sale of the said property on 24.8.2002 for recovery of the said amount due and payable by M/s. S.V. Real Estate pursuant to the award dated 11.7.2000, and the date of public auction was fixed as 5.10.2002.

7. The public auction fixed on 5.10.2002 did not materialize for want of bidders and consequently, the auction was postponed to 25.2.2003 on which day also the auction did not materialize for want of bidders and the auction was postponed to 14.3.2003. On the day of auction, an application was made by the General Manager of the third respondent bank to the first respondent requesting him to permit the third respondent to participate in the bidding at the auction. This application was granted. The auction was conducted. Upset price was fixed at Rs.5,63,42,500/-. But the first respondent accepted the bid offered by the third respondent of Rs. 3,96,58,101/- in partial satisfaction of the decree and declared that the property had been purchased by the third respondent for the sum of Rs. 3,96,58,101/-. On 19.4.2003, respondent 1 issued a sale certificate in favour of respondent 3. According to the petitioner, this auction was held in a fraudulent manner, without giving adequate publicity to the proclamation for sale. The petitioner, therefore, preferred an appeal being Co-operative Appeal No.1/2003/Multi/RCS before the Registrar of Co-operative Societies. While the appeal was pending before the Registrar, respondent 3 issued a public notice on 31.3.2006 stating that the said property was available for sale. The petitioner applied to the Registrar for stay of sale, if any. The Registrar directed that the transaction of sale, if

any, shall not be finalised pending the appeal. On 9.5.2006, the Registrar dismissed the said appeal and vacated the stay granted by him on the ground that he had no jurisdiction to entertain the same. Aggrieved by the proceedings of auction culminating in the sale of the said property in favour of respondent 3 and issuance of sale certificate in favour of respondent 3, the petitioner has approached this Court.

8. We have heard the Counsel for the parties at some length. Mr. Lotlikar, learned Counsel for the petitioner contended that there are two valuation reports, both dated 1.9.02 prepared by the same valuer. In one report, the market value of the said property is shown to be Rs.5,68,042,500/- and in the other report it is shown to be Rs.11,36,85,000/-. He submitted that these grossly divergent reports make the entire sale proceedings suspect. He submitted that fraud is writ large in the proceedings.

9. Mr. Lotlikar submitted that respondent 3 is a decree holder. Respondent 3 could not have been allowed to participate in the auction without obtaining the say of the petitioner and, therefore, the auction is illegal.

10. Mr. Lotlikar further contended that so far as the award against M/s. S.V. Real Estate is concerned, the petitioner which is a guarantor, was not made a party to it. The suit property did not belong to M/s. S.V. Real Estate. No order was sought for enforcement of mortgage. Therefore, that award cannot be executed against the petitioner, because the petitioner cannot appeal against it.

11. Mr. Lotlikar further submitted that there was no proper publication of the time and place of the intended sale or the terms and conditions of the proclamation and the Sale Officer failed to cause publication of the time and place of the intended sale by beat of drums as required by the relevant provisions. According to Mr. Lotlikar provisions of Rule 37, Sub-Rule (5), clause (i) of the said Rules were breached by the Sale Officer. He referred to ***Nani Gopal Paul v. T. Prasad Singh and others., AIR 1995 SC 1971.*** In that case, a learned Single Judge of the High Court took up the matter on various dates subsequent to the passing of the decree and sought to pass various orders relating to sale of the property in favour of the intending purchaser at a price of Rs.60,00,000/- when there were offers in the field of a higher denomination and magnitude. A Division Bench of the High Court, in appeal, observed that if there were other offers in the field, the Court should have been vigilant

enough to such offers whatever they were worth and there ought to have been due application of mind. When the matter reached the Supreme Court, the Supreme Court concurred with the view of the Division Bench of the High Court and held that the appellate Court would not remain a mute or helpless spectator to obvious and manifest illegality committed in conducting the Court sale. Mr. Lotlikar contended that observations of the Supreme Court in this case are squarely applicable to the present case. He submitted that because there was no proper proclamation of the time and place of the sale, there were no bidders and the said property was sold at a shockingly low price in a clandestine manner.

12. Mr. Lotlikar then relied on ***Desh Bandhu Gupta v. N.L. Anand & Rajinder Singh, (1994) 1 SCC 131***. In that case, the Supreme Court observed that estimate of the value of the property is a material factor to enable the purchaser to note its value. It must be valued as accurately and fairly as possible. The Supreme Court further observed that total absence of drawing up of the proclamation of sale and settlement of its term by judicial application of mind renders the sale a nullity being void. It is further held that if a proclamation of sale is drawn casually, without compliance of the mandatory requirement and sale is held in furtherance thereof, it is not a sale in the eye of law. The Supreme Court also observed that

in the sale proclamation material particulars like place or the time at which the sale was to be conducted must be mentioned and the proclamation must be published in the locality. The Supreme Court observed that a sale can be set aside on the ground of material irregularity, but not mere irregularity.

13. Mr. Lotlikar relied on ***Lal Chand v. VIIIth Addl. District Judge and ors. AIR 1997 SC 2106*** where the Supreme Court has held that the sale which is conducted without proper notice and publicity, is illegal. The Supreme Court referred to its earlier judgment in ***Shalimar Cinema v. Bhasin Film Corpn., AIR 1987 SC 2081,*** and reiterated that a proclamation of sale drawn casually without compliance of the mandatory requirement and a sale held in furtherance thereof is not a sale in the eye of law. It was observed that the procedure adopted by the Court in non-compliance of Order 21, Rules 66 and 67 is in flagrant breach of the mandatory provision. Mr. Lotlikar contended that in this case also the mandatory procedure is not complied with. The proclamation is casually drawn and no proper notice of sale was given. The ratio of Lal Chand's case, according to Mr. Lotlikar squarely applies to the present case.

14. Mr. Lotlikar also referred to ***Raghunath Singh v. Hazari Sahu and ors. AIR 1917 Patna 381*** where the Full Bench of Patna High Court has held that it is the duty of a Court in preparing a proclamation of sale to state as fairly and accurately as possible in the proclamation the value of the property. In that case, in the proclamation two greatly varying estimates of the value of the property were given. The Full Bench observed that such a proclamation is calculated to cause great inconvenience in the minds of bidders. The Full Bench also observed that action of the court in settling terms of a proclamation is a judicial act.

15. Mr. Lotlikar also relied on ***Gauri v. Ude and others, AIR (29) 1942 Lahore 153*** where it was held that under Order 21, Rule 90, a sale can be set aside only on the ground of a material irregularity or fraud in publishing or conducting it. Mr. Lotlikar contended that in the light of the above judgments, the instant sale must be set aside because it suffered from material irregularities and is vitiated by fraud.

16. Mr. Lotlikar then contended that the notification conferring power to act as Sale/Recovery Officer in respect of the awards passed in favour of respondent 3 on the employee of respondent 3 itself is illegal, arbitrary and unreasonable, unjust

and unfair as it is violative of Article 14 of the Constitution of India. Mr. Lotlikar then pointed out that under the scheme of the said Act and the Rules framed thereunder, the Sale/Recovery Officer performs important functions, some of which are judicial in nature and concern important right of persons proceeded against in execution and finality is given to the orders passed by the Sale/Recovery Officer without providing for any appeal against his orders. Therefore, the appointment of respondent 1 to act as Sale/Recovery Officer in respect of the award passed in favour of respondent 3 is complete negation of principles of natural justice and amounts to total denial of proper and fair and impartial adjudication of the dispute between respondent 3 and its debtors like the petitioner. In the circumstances, the said notification is liable to be set aside as unconstitutional and consequently, all actions, decision of respondent 1, who is an employee of respondent 3, are liable to be declared as null and void.

17. Mr. Lotlikar then contended that the order dated 9.5.06 passed by respondent 2 dismissing the appeal of the petitioner is unsustainable in law. The appeal was presented before respondent 2 within 30 days of the date on which the said property was auctioned and, therefore, as per Rule 37, Sub-Rule 14 of the said Act, the objections were filed well within time. Mr. Lotlikar

submitted that it was improper for respondent 2 to adopt a hyper-technical approach. Mr. Lotlikar submitted that respondent 2 erred in holding that he had no jurisdiction to entertain the appeal. Respondent 2 ought to have construed the appeal as objections to the sale under Rule 37, Sub-Rule 14 of the said Act and decided them himself or should have made them over to respondent 1. Mr. Lotlikar submitted that since respondent 2 had delegated his power to respondent 1, he had retained the power to deal with the matter. The delegation did not divest respondent 2 of the powers of the Central Registrar which are vested in him and in the exercise of those powers, he was competent to deal with the said appeal by treating it as objections under Rule 37, Sub-Rule 14 of the said Act. In this connection, Mr. Lotlikar relied on ***State of Orissa and ors. V. Commissioner of Land Records & Settlement, Cuttack and ors., (1998) 7 SCC 162.*** In that case, revisional jurisdiction of the Board of Revenue was delegated to the Commissioner under Section 33 of the Orissa Survey and Settlement Act, 1958. The Supreme Court held that in such circumstances, the order passed by the Commissioner as delegate of the Board has to be treated as an order passed by the Board itself. Mr. Lotlikar contended that for the above reasons, this is preeminently a fit case where the impugned auction should be set aside._

18. Mr. Sonak, learned counsel for respondent 3, on the other hand, contended that the present petition is not maintainable. In this connection, he relied on a Full Bench decision of this Court in ***Shamrao Vithal Co-operative Bank Ltd. and another v. Padubidri Pattabhiram Bhat and another, 1993 Mh.L.J. 1***. He submitted that respondent 3-bank is a co-operative society registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 and under the said Act carrying on the business of banking and governed by the Banking Regulation Act, 1949 and, as such, it is not "State" under Article 12 of the Constitution of India. In the light of the above judgment, the present writ petition, therefore, is not maintainable as against respondent 3-bank.

19. Mr. Sonak further contended that the objections raised by the petitioner are frivolous and vexatious. He submitted that when the auction proceedings were held, the representative of the petitioner was present. However, he raised no objection to the auction sale. Mr. Sonak pointed out two letters dated 29.3.03 and 10.4.03 addressed by the petitioner to the Administrator and contended that in these letters the petitioner has made no complaint about the auction. The petitioner has only prayed for one time settlement (OTS) facility. The learned Counsel contended that

under Rule 37, Sub-Rules (13) and (14), a detailed procedure is laid down, under which the order of the Sale Officer can be challenged. The petitioners did not adopt that procedure. On 19.4.03, the sale was confirmed. Thereafter, the petitioners preferred an appeal to the Registrar which is not maintainable. The learned Counsel pointed out that the auction sale was fixed on two occasions. Since the bidders were not available, the auction had to be postponed. Ultimately, the auction had to be concluded on 14.3.03. In the circumstances, no grievance can be made that the property was sold for a price which is below the upset price. Mr. Sonak submitted that the petitioners are unnecessarily trying to make capital out of the two valuation reports of the same date, submitted by the same valuer indicating two separate values-one treating the property as `commercial' and the other treating it as 'agricultural'. He submitted that there is indication in the record that it is at the petitioner's instance that this valuation was done.

20. Mr. Sonak submitted that there is no substance in the submission that appointment of employee of respondent 3 as Sale Officer is illegal and amounts to denying impartial adjudication of the dispute between the petitioner and the respondent. He submitted that on this point, the law is well settled. In support of this submission, Mr. Sonak relied on ***Accountant and Secretarial***

Services Pvt. Ltd. and anr. V. Union of India and ors., (1988) 4 SCC 324; and ***Delhi Financial Corpn. and another V. Rajiv Anand and others, (2004) 11 SCC 625***. Mr. Sonak submitted that the sale is not vitiated by any illegalities. There are no material irregularities in the conduct of the sale. Mr. Sonak contended that the petition suffers from laches and deserves to be dismissed.

21. Mr. Nadkarni, learned Counsel appearing for respondent 6, adopted most of the arguments of Mr. Sonak. He contended that under Rule 37, Sub-Rule (14)(i), the sale can be set aside only if there is material irregularity. The learned Counsel urged that in the appeal memo filed before the Registrar, there are no allegations that the sale suffered from any material irregularity. He submitted that the only prayer which the petitioners have made is about one time settlement. Since the impugned award has not been challenged, the auction was held on 14.3.03. The property is sold to respondent 6. Demand drafts of respondent 6 have been encashed by the Bank. The learned Counsel contended that the petition suffers from laches. The auction sale was held on 14.3.03. The petition is filed as late as on 17.6.06 and, therefore, the petitioners should not be granted any relief.

22. From the rival pleadings and the record of the case, it is clear that respondent 1 initiated recovery proceedings in respect of two loan transactions. One award is against the petitioner and the second award is against M/s. S.V. Real Estate. From the first award, it is clear that it is the failure of the petitioners to repay the loan taken by them from respondent 3 that has resulted in the said award. So far as the award against M/s. S.V. Real Estate is concerned, it appears that M/s. Real Estate is a firm of sole proprietor Shri Sandeep S. Verlekar and the petitioner as guarantor had mortgaged the said property as security for loan obtained by Shri Sandeep Verlekar. It is an accepted fact that the petitioner has not challenged the award.

23. It is necessary to find out whether the petitioners' objections to the auction is genuine. From the minutes of the auction proceedings dated 14.3.03, it is revealed that the Director of the petitioners Shri Sanjeev Tarkar was present at the time of the auction. The minutes note that the upset price was fixed at Rs. 5,63,42,500/- and the third respondent had offered highest bid of Rs.3,96,58,101/-. It is noted that there were no other bidders. Hence the Bank was declared to be the purchaser. The proceedings do not show that Mr. Sanjeet Tarkar had raised any objections. Our attention is drawn to the letter dated 29.3.03 sent by the petitioners

to the Administrator of respondent 3. The upset value of the property is noted in this letter. There is no complaint in this letter that the said property was sold at a low price. There is no grievance about the auction. In fact, it is stated that now that property has been taken by the Bank in auction, the petitioners are entitled to O.T.S. and the balance should be paid to them. We may quote the last paragraph of this letter, which reads thus :

> "We therefore earnestly request you Sir, to consider all the facts and circumstances as aforesaid and to allow us the OTS figure for the settlement of all the three accounts and to adjust the amount from the purchase of the auctioned property towards the OTS figure and to refund to us the difference of the amount between Rs. 3,96,58,101/- and the OTS figure."

24. We have also been shown another letter addressed by the petitioners to the Administrator of the third respondent-bank. In this letter also, the request is for OTS. There is no complaint about the auction. We may quote the last paragraphs of the said letter, which is as under :

> "Without prejudice to our other rights, we request you to please adjust the amount of Rs.20 lakhs towards the full settlement of the Decree, executed by the auction of the property by the Recovery/Sale Officer, Central Registrar of Co-operative Societies Court No.1 at Mapusa."

It is pertinent to note that in the memo of appeal, filed in the court of Registrar of Co-operative Societies, also there is no challenge to the auction. Only adjustment of loan is sought. We may reproduce the relevant prayers. They read thus :

> "ii That the Hon'ble Court be pleased to direct the Respondent Bank to adjust the amount against the OTS amount in terms of the Guidelines of the Respondent Bank and the Scheme set out by the Reserve Bank of India.
>
> iii That the Hon'ble Court be pleased to direct the Respondent Bank to pay to the Appellant No.1 the difference between the amount of Rs.5,68,42,500/- being the upset value and the amount of Rs.3,96,58,101/- being the bid amount which the property has been held to be purchased by the respondent Bank.
>
> iv. That the difference of the amount between Rs.3,96,58,101/- and the amount payable in terms of the OTS proposal be directed to be paid to the appellant No.1.
>
> v. That any other Order deemed fit and proper in the circumstances of the case be made."

25. It is relevant to refer to the judgment of the Registrar of Co-operative Societies in the appeal filed by the petitioners. The

Registrar has referred to the above mentioned correspondence and stated that there are no specific objections raised by the petitioners as regards material irregularity allegedly vitiating the auction sale. There is no request to set aside the auction sale. It is also said that if the petitioners wanted the sale to be set aside, they should have preferred an application under either Sub-Rule 13 of Rule 37 with required deposit of money or under Sub-Rule 14 of Rule 37 contending that there are material irregularities. In our opinion, the Registrar has rightly rejected the appeal as not being maintainable.

26. In this connection, it is necessary to have look at Sub-Rules 13 and 14 of Rule 37 of the said Rules. They provide for a procedure which a person can adopt if he wants to challenge the auction sale. The petitioners have not chosen to adopt that remedy. The sale was confirmed on 19.4.03. The petitioners did not prefer any application within 30 days as required by law. It is now being argued that the appeal should have been treated as an application under the relevant provisions of the said Rules. Even if it was to be treated as an application, from the extracts quoted by us hereinabove, it is clear that no relief for setting aside the auction has been sought in that appeal.

27. The petitioner is making grievance that there are two reports of the same date, giving two different values and that creates a doubt about the auction. There is no substance in this submission. Respondent 3 has given proper explanation for this in its affidavit in reply. It appears that the petitioner had submitted a gazette publication inviting objections to change of zone of the said property from `agricultural' to `settlement'. This is evident from the letter dated 29.3.2003 sent by the petitioner to the Administrator. It is the petitioner who had requested that the valuation be prepared on the basis that the property is in commercial zone by holding out that the property was to be converted into commercial zone. It is in these circumstances that the two valuation reports might have been prepared. This explanation appears to be proper and acceptable. In any event, we do not find any circumstances on record which would reflect on the genuineness of auction sale. Admittedly, earlier two auctions were arranged. There were no bidders and the property could not be sold. It is in these circumstance that the property had to be sold to the bank as only available bidder. Besides, there was no objection from the petitioners to the sale of the property to the bank.

28. There can be no dispute about the proposition that the courts have to be very vigilant and if any manifest illegality is found

to have been committed in an auction, the courts should not hesitate to set it aside. The courts have to find out whether the sale is conducted with proper notice and material particulars are set out in the sale proclamation. But, it is also well settled that a sale can be set aside only on the ground of material irregularity and not on the ground of mere irregularity. This has been held by the Supreme Court in Desh Bandhu Gupta's case on which the learned Counsel for the petitioners has placed reliance. In Gauri's case on which reliance is placed by Mr. Lotlikar, it has been held that a sale can be set aside only on the ground of a material irregularity or fraud in publishing or conducting it. In the facts before us, we are unable to come to a conclusion that the sale is vitiated by any material irregularity. The proclamation of sale describes the property properly. There was adequate publicity to the proclamation of sale. Besides, neither during the auction proceedings nor thereafter while corresponding with the respondents the petitioner has objected to the auction sale on the ground of any material irregularity. Sub-Rule 14 of Rule 37 of the said Rules provides that at any time within 30 days from the date of sale of immovable property, the decree holder or any person entitled to share in a ratable distribution of the assets or whose interests are affected by sale, may apply to the Recovery Officer to set aside the sale on the ground of material irregularity or mistake or fraud in publishing or

conducting it. The proviso (i) to Sub-Rule (14) of Rule 37 provides that no sale shall be set aside on the ground of irregularity or fraud unless the Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of such irregularity, mistake or fraud. It is further provided that if such application is allowed, the Recovery Officer shall set aside the sale and direct a fresh one. If on expiration of 30 days from the date of sale, no application to have the sale set aside is made, or if such application has been made and rejected, the Recovery Officer shall make an order confirming the sale. It is further provided that after the confirmation of any such sale, the Recovery Officer shall grant a certificate of sale and such certificate is conclusive evidence of the fact of the purchase in all courts and tribunals and such an order made under Sub-Rule 14 is final. The petitioner did not make any application within 30 days as required by Sub-Rules 13 or 14 of Rule 37 of the said Rules for setting aside the sale. The certificate of sale was issued on 19.4.03. There was an alternate efficacious remedy available to the petitioner which the petitioner did not adopt. We find substance in the submission of the learned Counsel for the respondents that this remedy was not availed of by the petitioners to avoid depositing the amount as contemplated by Sub-Rule 13. In order to avoid deposit, the petitioner filed an appeal which is clearly not maintainable. The submission that that appeal should have

been treated as an application is devoid of substance and must be rejected.

29. In our opinion, the petition suffers from laches. The petitioner wants the sale dated 14.3.03 and the certificate of sale dated 19.4.03 to be set aside. The petition is filed on 17.6.2006. In between an attempt was made by the petitioners to prefer an appeal. On the face of it, the appeal was not maintainable before the Registrar of Co-operative Societies. The petitioner did not make application as required by law, obviously to avoid deposit of money. It is pertinent to note that respondent 3 has now sold the said property to respondent 6. Respondent 6 has deposited an amount of Rs. 7,40,00,000/-. Third party rights have been created. In the circumstances, it is not possible to interfere with the auction, particularly when the petitioner has not been able to substantiate the case of fraud. There is no material irregularity in the conduct or publicity of auction.

30. So far as the argument that respondent 1 being an employee of respondent 3-bank could not have been appointed as Recovery/Sale Officer is concerned, that submission must be rejected. In ***Delhi Financial Corpn. And another v. Rajiv Anand and others (2004) 11 SCC 625***, the Supreme Court was concerned

with appointment of Managing Director as an authority under Section 32-G of State Financial Corporations Act, 1951. As regards the doctrine of "no man can be a judge in his own cause", the Supreme Court observed that merely because an officer of a Corporation is named to be the authority, does not by itself bring the said doctrine into operation. The Supreme Court held that the control of the State Financial Corporation by virtue of Section 9 of the said Act vests in a Board of Directors. The Board of Directors, of course, would take assistance of the Executive Committee and the Managing Director. But the control remains that of the Board of Directors and, therefore, there is no question of presuming that there was any conflict of duty or that the Managing Director would not act fairly. Similar view was taken by the Supreme Court in ***Accountant and Secretarial Services Pvt. Ltd. and anr. V. Union of India and ors., (1988) 4 SCC 324.*** Therefore, in the absence of any evidence of bias or fraud, appointment of respondent 1 cannot be faulted. In the facts of this case, we are not inclined to hold that respondent 1's conduct is suspect.

31. We may also refer to the Full Bench decision of this Court in ***Shamrao Vithal Co-operative Bank Ltd. and another v. Padubidri Pattabhiram Bhat and another, 1993 Mh.L.J. 1.*** In that case, this Court has held that a co-operative society registered

under the provisions of the Maharashtra Co-operative Societies Act, 1960 and under the said Act carrying on business of banking and governed by the Banking Regulation Act, 1949 is not "State" under Article 12 of the Constitution of India. Mr. Sonak contended that, therefore, the present writ petition against respondent 3 is not maintainable. Contention of Mr. Sonak appears to be well-founded. But, it is not necessary for us to go into this question because on the facts of this case, we are satisfied that the auction is not vitiated by any fraud or irregularity.

33. It was also argued on behalf of the petitioners that in the award of M/s. S. V. Real Estate, the petitioner is not a party and, therefore, the said award could not have been executed against the petitioner. This argument is also liable to be rejected. It is an admitted position that in so far as loan taken by M/s. S.V. Real Estate is concerned, the said property is mortgaged for that loan and the petitioner has stood guarantor for that loan. Therefore, no illegality is committed.

33. Besides, third party rights have now been created. Since there is no evidence to establish fraud and since there is no material illegality in the conduct of the auction, this belated attempt on the

part of the petitioner to set aside the auction cannot be entertained. The petition is, therefore, rejected.

SMT. RANJANA P. DESAI, J.

N.A. BRITTO, J.

ssm.

At this stage, Mr. Lotlikar requests that the parties may be directed to observe status quo. The prayer is rejected.

SMT. RANJANA P. DESAI, J.

N.A. BRITTO, J.